NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

# ManorCare of Kingston PA, LLC and Laborers International Union of North America Local 1310. Case 04–CA–129388

August 11, 2014

#### **DECISION AND ORDER**

# BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND SCHIFFER

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed by Laborers International Union of North America Local 1310 (the Union) on May 27, 2014, the General Counsel issued the complaint on June 3, 2014, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to recognize and bargain following the Union's certification in Case 04-RC-109516. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Sections 102.68 and 102.69(g). Frontier Hotel, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint, and asserting affirmative defens-

On June 16, 2014, the General Counsel filed a Motion for Summary Judgment and Memorandum in Support of Motion. On June 17, 2014, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

## Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain but contests the validity of the certification on the basis of its objections to conduct alleged to have affected the results of the election in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding.<sup>1</sup> The Respondent does not offer to ad-

duce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

Accordingly, we grant the Motion for Summary Judgment.<sup>2</sup>

On the entire record, the Board makes the following

#### FINDINGS OF FACT

#### I. JURISDICTION

At all material times, the Respondent, a Delaware limited liability company, has been providing skilled nursing and rehabilitation services at its facility at 200 Second Avenue, Kingston, Pennsylvania (the Center).

During the 12-month period preceding issuance of the complaint, the Respondent received gross revenues in excess of \$100,000 and purchased and received at the Center goods valued in excess of \$50,000 directly from points outside the Commonwealth of Pennsylvania.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is a health care institution within the meaning of Section 2(14) of the Act, and that the Union, Laborers International Union of North America Local

tor Walsh was "null and void," and that the Board's subsequent certification of the Union is "fatally tainted and cannot stand."

The Respondent offers no justification for its failure to make these arguments in a timely fashion in the underlying representation proceeding. Indeed, the Respondent not only failed to raise a timely challenge to the authority of the Regional Director, it entered into a Stipulated Election Agreement in which it waived the right to a hearing and expressly agreed to the conduct of a secret-ballot election. Under these circumstances, we reject the Respondent's arguments as untimely, and we find that the Respondent is estopped from attacking the propriety of an election to which it has expressly agreed.

Finally, even assuming that the Respondent's challenge to the Regional Director's authority was not otherwise barred, the Respondent's argument is without merit. In this regard, on July 18, 2014, in an abundance of caution and with a full complement of five Members, the Board ratified nunc pro tunc and expressly authorized the selection of Dennis Walsh as Regional Director of Region 4. In a further abundance of caution, on July 30, 2014, Regional Director Walsh affirmed and ratified any and all actions taken by him or on his behalf during the period of March 10, 2013, to July 18, 2014.

<sup>2</sup> The Respondent's requests that the complaint be dismissed and a new election be directed are therefore denied.

Member Johnson notes that he dissented from the majority's decision to reverse the hearing officer and to dismiss all objections in the underlying case. *ManorCare of Kingston PA, LLC,* 360 NLRB No. 93 at slip. op. 2 fn.4 (2014). However, he agrees that the Respondent has not raised any issue that is properly litigable in this current proceeding.

<sup>&</sup>lt;sup>1</sup> In its response to Notice to Show Cause, the Respondent argues for the first time that the Board lacked a quorum at the time it approved the appointment of Dennis Walsh as Regional Director for Region 4 on March 10, 2013. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). The Respondent further argues that the appointment of Regional Director

1310, is a labor organization within the meaning of Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

#### A. The Certification

Following the representation election held on September 6, 2013, the Union was certified on April 29, 2014, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

INCLUDED: All full-time and regular part-time CNAs employed by the Employer at its 200 Second Avenue, Kingston, Pennsylvania facility.

EXCLUDED: All other employees, LPNs, RNs, maintenance employees, office clerical employees, guards and supervisors as defined in the Act.<sup>3</sup>

The Union continues to be the exclusive collectivebargaining representative of the unit employees under Section 9(a) of the Act.

#### B. Refusal to Bargain

At all material times, Linda Tierson held the position of interim administrator of the Respondent, and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

By letter dated May 15, 2014, the Union requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the unit. Since May 16, 2014, the Respondent has failed and refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

### CONCLUSION OF LAW

By failing and refusing since May 16, 2014, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to recognize and bargain on request with the Un-

ion and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); accord *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964).

#### **ORDER**

The National Labor Relations Board orders that the Respondent, ManorCare at Kingston PA, LLC, Kingston, Pennsylvania, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Failing and refusing to recognize and bargain with Laborers International Union of North America Local 1310 as the exclusive collective-bargaining representative of the employees in the bargaining unit.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

INCLUDED: All full-time and regular part-time CNAs employed by the Employer at its 200 Second Avenue, Kingston, Pennsylvania facility.

EXCLUDED: All other employees, LPNs, RNs, maintenance employees, office clerical employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Kingston, Pennsylvania, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places,

<sup>&</sup>lt;sup>3</sup> For purposes of eligibility in the September 6 election, "regular part-time" included employees who worked an average of 4 hours per week during the 13-weeks preceding July 23, 2013.

<sup>&</sup>lt;sup>4</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 16, 2014.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 4 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 11, 2014

Mark Gaston Pearce,	Chairman
Harry I. Johnson, III,	Member
Nancy Schiffer,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

#### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT fail and refuse to recognize and bargain with Laborers International Union of North America Local 1310 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

INCLUDED: All full-time and regular part-time CNAs employed by us at our 200 Second Avenue, Kingston, Pennsylvania facility.

EXCLUDED: All other employees, LPNs, RNs, maintenance employees, office clerical employees, guards and supervisors as defined in the Act.

MANORCARE OF KINGSTON PA

The Board's decision can be found at <a href="https://www.nlrb.gov/case/04-CA-129388">www.nlrb.gov/case/04-CA-129388</a> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

